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No. 92-244

In the Supreme Court of the United States

OCTOBER TERM, 1992

PETER R. PIEKARSKI, PETITIONER

v.

HOME OWNERS SAVING BANK, F.S.B., AND M. GENE DONLEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district court correctly allow the Resolution Trust Corporation to remove this case from state court under 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990), which grants the Resolution Trust Corporation the right to remove any action to which it is a party.

2. Can a collateral document filed simultaneously with a notice of appeal serve as the functional equivalent of a notice of appeal pursuant to Federal Rule of Appellate Procedure 3(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A71) is reported at 956 F.2d 1484. The opinions of the district court on the merits (Pet. App. A72-A104, A105-A145, A146-A261) are reported at 759 F. Supp. 542, 755 F. Supp. 859, and 752 F. Supp. 1451, respectively. The prior opinion of the United States District Court for the District of Minnesota declining to remand the case to state court (App., *infra*, 1a-3a) is unreported. The opinion of the United States District Court for the District of Columbia accepting

removal and transferring the case to the United States District Court for the District of Minnesota (Pet. App. A262-A294) is reported at 743 F. Supp. 38. The opinion of the state trial court on the liability issues appears as an appendix to one of the district court's opinions (Pet. App. A186-A261), but is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1992. A petition for rehearing was denied on April 8, 1992. Pet. App. A315. The petition for a writ of certiorari was filed on July 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, formerly an officer of the Home Owners Savings Bank in Fergus Falls, Minnesota (Fergus Savings), filed this suit in November 1988 in a state court in Hennepin County, Minnesota, alleging that he was wrongfully terminated from his position. Petitioner named as defendants not only Fergus Savings, but also a parent company, Home Owners Savings Bank of Boston (Home Owners), respondent Knutson Mortgage (another subsidiary of Home Owners), and respondent M. Gene Donley, the president of Fergus Savings. In December 1989 a bench trial was held on liability issues. The state trial judge held all of the defendants liable and issued a judgment in favor of petitioner in February 1990. Pet. App. A269-A271.

2. In April 1990, before the state court conducted the damages phase of the trial, the Office of Thrift Supervision declared Home Owners insolvent and appointed the Resolution Trust Corporation (RTC) as conservator. Accordingly, RTC became a party to the

case. On May 7, 1990, RTC removed the case to the United States District Court for the District of Minnesota, relying on 28 U.S.C. 1441(a) and 12 U.S.C. 1819(b)(2)(B) (Supp. II 1990).[1] The Minnesota district court held that it did not have jurisdiction over the case, concluding that 12 U.S.C. 1441a(*l*) (Supp. II 1990) governs all removals by RTC, and that Section 1441a(*l*)(3) permits removal only to the United States District Court for the District of Columbia in cases that are not brought by RTC and do not involve the actions of RTC after appointment as a conservator or receiver. Accordingly, the court remanded the case to the state trial court. See Pet. App. A271-A274.

3. On June 15, 1990, RTC removed the case from the state court to the United States District Court for the District of Columbia, relying on 12 U.S.C. 1441a(*l*) (Supp. II 1990). Pet. App. A274-A275. That provision provides that "any civil action * * * to which the [RTC] is a party shall be deemed to arise under the laws of the United States," Section 1441a(*l*)(1), and that RTC "may * * * remove any such action, suit, or proceeding from a State court to the United States District Court for the District of Columbia," Section 1441a(*l*)(3).[2]

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[1] Section 1441(a) permits removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 12 U.S.C. 1819(b)(2)(B) (Supp. II 1990) generally authorizes FDIC to "remove any action, suit, or proceeding from a State court to the appropriate United States district court."

[2] As the Minnesota district court noted, the provision also allows removal to "the United States district court for the district where the institution's principal business is located," but only in cases that "aris[e] out of the actions of the [RTC] with respect to an institution for which a conservator or a receiver has been appointed." 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990) The provision subsequently has been amended to remove

Petitioner challenged the removal, but the district court concluded that it was proper. Pet. App. A262-A294. The court noted that Section 1441a(*l*)(3) broadly "gives the RTC the absolute right, subject to certain time restraints, to remove *any* case from a state court in which it is named or is substituted as a party." Pet. App. A276. Accordingly, because RTC was a party and filed its removal petition to the District of Columbia court less than 90 days after the date it became a party, removal was proper. *Id.* at A276-A278.

The court rejected petitioner's claim that the holding that removal was proper unfairly allowed RTC a second opportunity to remove the case in contravention of the ruling of the Minnesota court. The court explained:

> FIRREA does not prohibit a party from correcting [a] defective removal * * * . RTC merely cured its original mistake of removing this action to the United States District Court for the District of Minnesota by removing this case to this Court[.] Judge Devitt did not hold that *any* removal was improper—instead, he held merely that removal was improper to the federal court in Minnesota. Thus, there is no law of the case which served to bar this removal.

Pet. App. A280-A281. The court also rejected petitioner's argument that it should remand the case

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this distinction, and thus now allows removal, at the option of RTC, to the federal district court in the District of Columbia, the district that includes the place where the suit is pending, or the district where the principal place of business of the failed institution is located. See Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991, Pub. L. No. 102-233, § 316, 105 Stat. 1772.

based on "principles of abstention and judicial economy," noting that this Court had rejected a similar argument in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 343-345 (1976). Pet. App. A281-A282. Finally, the court granted petitioner's motion to transfer the case back to the Minnesota federal court pursuant to 28 U.S.C. 1404(a). Pet. App. A283-A294.

4. Petitioner promptly filed a motion asking the Minnesota federal court again to remand the case to the state courts. The district court rejected this motion, explaining that it was "without authority to grant the remand motion," because the case was properly filed in the District of Columbia district court and properly had been transferred to the Minnesota district court. App., *infra*, 2a. On the merits, the court found Home Owners and Donley liable to petitioner for $120,000 in past damages and $35,000 in lost future earnings, found Donley liable for $25,000 in punitive damages, and awarded petitioner about $163,000 in attorney fees and costs. Pet. App. A72-A104, A105-A145, A146-A261; see *id.* at A22-A23.

5. Home Owners and Donley filed a notice of appeal within the 30-day period required by Federal Rule of Appellate Procedure 4. The face of the notice, however, listed the appellants as "Home Owners Savings Bank F.S.B., et al.," and thus did not explicitly state that Donley was appealing. Pet. App. A301-A302. The Appeal Information Form attached to the notice, however, explicitly listed Donley as an appellant. *Id.* at A303.

The court of appeals reversed. Pet. App. A1-A71. First, it rejected petitioner's argument that the failure to list Donley as an appellant on the notice of appeal precluded Donley from participating in the

appeal. *Id.* at A13 n.1. The court explained that the Information Form "unambiguously listed Donley as a party appealing the final judgment" and thus "serves as the 'functional equivalent' of a notice of appeal." *Ibid.* On the merits, it reversed all of the findings of liability, "primarily on sufficiency of the evidence." *Id.* at A14. Because none of the parties challenged the propriety of the removal, the court of appeals did not address the district court's jurisdiction.

ARGUMENT

1. The bulk of the petition (Pet. 17-54) argues that removal was improper either because it violated a common-law rule against successive removal petitions (Pet. 17-36) or because it deprived petitioner of due process (Pet. 36-54). In the court of appeals, however, petitioner did not contest the jurisdiction of the district court (apparently because the district court had ruled in his favor). Accordingly, these arguments—neither raised before nor addressed by the court of appeals—are not properly before the Court. *E.g.*, *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991). Moreover, as we explained at note 2, *supra*, Congress has amended Section 1441a(*l*)(3) to remove the potential for confusion that resulted in the inconveniences of which petitioner complains. In any event, petitioner offers no substantial reason to believe that either claim would merit review in this Court.

a. The propriety of the removal is evident from the provisions of 12 U.S.C. 1441a(*l*) (Supp. II 1990). First, subsection (1) provides: "Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the Corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original

jurisdiction over such action, suit, or proceeding."[3] Second, subsection (3) provides that "[t]he Corporation may * * * remove any such action, suit, or proceeding from a State court to the United States District Court for the District of Columbia." The only qualification is that the removal "shall be instituted * * * not later than 90 days after the date the Corporation is substituted as a party." Because RTC is a party to this case, and because the removal petition was filed on June 15, 1990 (less than 90 days after the April appointment of RTC as conservator for Home Savings), the federal district court in the District of Columbia necessarily had jurisdiction over RTC's petition for removal.

Petitioner's reliance on common-law principles to override the plain language of Section 1441a(*l*) is misplaced. First, petitioner must acknowledge that no court has accepted petitioner's claim that a common-law prohibition on successive removal petitions overcomes the language of Section 1441a(*l*). Cf. *Kirkbride* v. *Continental Casualty Company*, 933 F.2d 729, 732 (9th Cir. 1991) (relying on the language of a statute authorizing removal by the Federal Deposit Insurance Corporation to permit a successive removal petition by that entity). Moreover, the only court of appeals decision on which he relies to support his argument that a successive petition is permissible only if the ground for removal arose after the first petition, *Federal Deposit Insurance Corporation* v. *Santiago Plaza*, 598 F.2d 634 (1st Cir. 1979), did not rely on a common-law doctrine to defeat removal. Rather, it held that the removal in that case could

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[3] Section 1441a(a)(2) provides that all references to the "Corporation" in Section 1441a refer to the Resolution Trust Corporation.

not be justified under the provision in 28 U.S.C. 1446(b) that expressly allows certain types of second removal petitions. Because RTC relied on 12 U.S.C. 1441a(*l*) (Supp. II 1990) to support removal, the question whether it also could have removed the case under 28 U.S.C. 1446(b) is irrelevant.

b. Nor is there any merit to petitioner's claim (Pet. 36-54) that the application of federal law to provide for removal of this case to federal court has deprived petitioner of due process. As this Court has explained, "[n]o one has a vested right in any given mode of procedure * * * and so long as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change." *Crane* v. *Hahlo*, 258 U.S. 142, 147 (1922). The statute plainly affords petitioner a "substantial and efficient remedy"; it affords him substantially the same remedy he had under state law, simply requiring him to pursue that remedy in federal court. Petitioner's real complaint is that although he won at a trial in state court, a federal appellate court has determined that he presented inadequate evidence to support the judgment in his favor. But he does not challenge the court of appeals' rulings on that point in this Court, and cannot credibly claim that a litigant is deprived of due process by procedures that permit appellate review of trial courts' factual findings.

Petitioner acknowledges that "[t]he only case to address the issue has rejected the due process challenge." Pet. 46 (citing *Sunbelt Savings, FSB* v. *Bent Trail Phase IV Joint Venture*, 907 F.2d 1569, 1571 (5th Cir. 1990)). Accordingly, his contention that the procedures afforded to him deprived him of due process would not merit further review even if it had been presented to the court of appeals.

2. Finally, petitioner challenges (Pet. 54-63) the court of appeals' conclusion that the Appeal Information Form attached to respondents' notice of appeal should serve as the "functional equivalent" of a notice of appeal, arguing that there is a conflict in the circuits on this question. Petitioner fails to acknowledge, however, that this Court resolved the conflict last Term in *Smith* v. *Barry*, 112 S. Ct. 678 (1992). In that case, the Court explained: "If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal." *Id.* at 682. Because the Appeal Information Form was filed within the time specified by Rule 4, and contained the information specified by Rule 3, the court of appeals correctly held that the document served as a notice of appeal for respondent Donley.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1992

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. 4-90-661

PETER R. PIEKARSKI,
PLAINTIFF

v.

HOME OWNERS SAVINGS BANK, F.S.B., f/k/a WESTERN MINNESOTA FEDERAL SAVINGS AND LOAN ASSOCIATION, f/k/a WESTERN MINNESOTA SAVINGS AND LOAN ASSOCIATION, f/k/a FERGUS FALLS SAVINGS AND LOAN ASSOCIATION; KNUTSON MORTGAGE CORPORATION, A DELAWARE CORPORATION; HOME OWNERS FEDERAL SAVINGS AND LOAN ASSOCIATION, A FEDERALLY CHARTERED SAVINGS AND LOAN ASSOCIATION; AND M. GENE DONLEY,
DEFENDANTS

[Filed Oct. 15, 1990]

ORDER DENYING REMAND

This wrongful termination from employment action has been transferred to this District from the District of Columbia under 28 U.S.C. 1404(a).

Plantiff moves for remand to the Minnesota District Court where it was first filed. *

The court is without authority to grant the remand motion. The case was properly in the United States District Court for the District of Columbia under FIRREA, 12 U.S.C. 1441a(l)(1)(3) and was later permissibly transferred to the United States District Court for the District of Minnesota under 28 U.S.C. 1404(a) for the convenience of parties and witnesses since the case is obviously a typical one for trial in this vicinage. All parties and witnesses are in Minnesota, the alleged wrongful discharge took place here and the case has been partially tried in this district.

Although there are logical arguments for the trial to be completed before Judge Harlan Nelson in the state court, the entry into the case by Resolution Trust Corporation on June 15, 1990 as conservator of several defendants, and that corporation's statutory right of removal to the federal court, forecloses remand to the state court.

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* The issue was partially tried in the Minnesota State District Court, later removed to the United States District Court for the District of Minnesota, then remanded to the Otter Tail County State District Court and then removed to the United States District Court for the District of Columbia and then transferred, under 28 U.S.C. § 1404(a) (for the convenience of parties and witnesses and in the interests of justice), to the District of Minnesota for trial on the sole remaining issue of damages.

Plaintiff's motion for remand to the state court is DENIED.

Dated: October 15, 1990.

/s/ Edward J. Devitt
EDWARD J. DEVITT
United States District Court